BOOK REVIEWS.

A CONCISE TREATISE ON THE LAW OF WILLS. By William Herbert Page. Cincinnati: W. H. Anderson & Co. 1901. pp. xxxi, 1172.

However much this book may contain of sound law correctly stated, it is certain that very many of its statements are either highly misleading or absolutely erroneous. The fact that in these respects it represents a class, may justify an examination of a few of its shortcomings.

It is unnecessary to give the proof reading more than a passing word. Such errors for example, as "dispositve" (p. 204); "accomplihes" (p. 215); "adition" (p. 621) and "interst" (p. 1129), tend to suggest an inaccuracy in more important matters, which examination only too well confirms. The names of cases cited are also frequently incorrect, as in the instance of Estate of Cavarly,[1] which is cited on page 635 as Cavalry's Estate, on page 739 as Estate of Cavalry and on page 740 as Cavarly's Estate, while in the Table of Cases it appears as Cavalry's Estate. Other illustrations will appear as we proceed.

In order to test the general accuracy of the work, a number of sections, or parts of sections, have been selected at random for special examination, with more particular reference to their presentation of the law of New York. It is possible, of course, that the other parts of the volume are free from the defects discoverable in those thus selected, and the following results of this examination are merely offered for what they may be worth as an indication of the reliability of text and citations.

In § 183, page 202, it is said that "It may be laid down as a *general rule* that as an attestation clause is not strictly part of the will, but rather a certificate thereto, *and yet a certificate made necessary by statute*," &c., while in § 223, page 244, it is stated that "under the statutes in force in *most states*, a formal attestation clause is *not necessary*."

In § 185, page 202, referring to wills where a blank space of some considerable extent is left between the body of the will and testator's signature, the author states that "the courts are at variance as to whether such a will is signed at the end thereof or not. *Some courts* look upon the statute requiring the signature to be at the end, as intended only to do away with the difficulty of determining whether a will was signed or not. *Under such a theory* of the existence of the statute they hold that a signature after the

[1] 119 Cal. 406.

body of the will is at the end, even though a blank space intervenes." (To this statement numerous cases are cited, including "Gilman's Will."[1]) "*Other courts* hold that an additional reason for requiring the signature to be at the end of the will was to prevent fraudulent additions to the will. *Such* courts, therefore, hold that a signature saparated from the body of the will by a blank space is not a signature at the end within the meaning of the statute" (citing one case from Kentucky).

Now this gives an entirely erroneous view of the law from the New York standpoint. For while, so far as concerns the validity of a will so executed, the New York decision cited[2] falls within the first of these two classes, yet the opinion does not put the ruling on the author's ground that the statute is intended only to do away with the difficulty of determining whether a will was signed or not; and on the contrary it has long been firmly established that "the aim of the statute is to prevent fraud; to surround testamentary dispositions with such safeguards as will protect them from alteration."[3] Matter of Gilman, therefore, does not at all justify or illustrate the basis of distinction laid down in the text.

In § 224, page 245, we learn that "In some states it is required by statute that the witness write his place of residence opposite his name. Such provisions *are held* to be directory only, and the omission of the place of residence does not invalidate the will unless the statute expressly gives such effect to the omission. In support of this only three cases are cited, one from Louisiana[4], and two from New York.

The only possible meaning of the text is that in those two States one or the other of the following situations will be found: (a) A mere statutory requirement that the address must be written after the name of the witness, with no statutory declaration that the omission of the address shall invalidate the will; and a judicial declaration that in such a case the requirement is merely directory; or (b) a statutory requirement that the address must be written after the name of the witness and a further express statutory requirement that the omission of the address shall invalidate the will. Now, in fact, neither of these situations exists in New York. For the statute (2 R. S., 64, § 41) expressly provides, in terms, that "Such omission shall not effect the validity of any will," and it is, therefore, the express language of the statute, and not the decisions of the courts proceeding upon the absence of a statute dealing with the effect of an omission, which renders the provision "directory." The author's citations on this subject are also unfortunate. For Matter of Phillips,[5] though it illustrates the law of New York as it is declared by the statute above quoted, does not in any way support the text; while Dodge *v.* Findlay,[6] not only appears with the defendant's name misspelled, but has no bearing

[1] 38 Barb. 364. [2] Matter of Gilman, 38 Barb. 364.

[3] Matter of Conway, 124 N, Y. 455, 457.

[4] Succession of Justus, 47 La. Ann. 302. [5] 98 N. Y. 267.

[6] 57 N. Y. Supp. 791.

whatever, either *pro* or *con*, on the author's statements. And the Louisiana case cited deals with a statute differing radically in its requirement and purpose from the class referred to in the text.

A similar confusion of the distinction between a judicial decision upon a point not in terms expressed in a statute, and a decision avowedly based upon an explicit statutory provision, appears in § 178, page 197, where after stating the effect of a Missouri statute requiring that a person who writes testator's name for him, must add his own name as a subscribing witness to the will, the author says that "under a somewhat similar New York statute it was *held* that if one who signed a will for testator omitted to sign his own name the will was not thereby invalidated," &c., citing Hollenbeck *v.* Van Valkenburgh[1]. It was certainly very proper for the court to hold as it did in that case, for the New York statute expressly provides that "such omission shall not affect the validity of any will[2]."

In § 284, page 324, which relates to the effect of marriage upon a woman's previously executed will, and which has the rather ambiguous heading "effect of marriage on will of wife," the author first states that "at common law the will of a woman was, *ipso facto*, revoked by her marriage." He then classifies the laws of the various States as follows: "This rule was very generally adopted as the common law rule in the United States (citing, among others, two Massachusetts cases, Nutt *v.* Norton[3], and Swan *v.* Hammond[4], and one New York case) and has been re-enacted by statute in many states (citing, among others, two Massachusetts cases, Blodgett *v.* Moore[5], and Swan *v.* Hammond[6], and one New York case). In some states, on the other hand, this rule has been expressly repealed by statute" (citing, among others, a Massachusetts case, Church *v.* Crocker[7]). As to the Massachusetts law, this is certainly confusing, for it appears to suggest that in Massachusetts, at a comparatively late date, the common law rule still existed in the form of a declaratory statute, although the rule itself had long before been expressly repealed. The fact is, that the statute referred to in Church *v.* Crocker as repealed, (being § 3 of the provincial statute 12 W. 3, c. 7), related only to the effect of a *man's* marriage upon his previously executed will, and the case has no bearing upon the point to which it is cited.

As to the law of New York on the same subject, the citations correctly represent the fact that the common law rule, as such, was adopted, and was subsequently substantially re-enacted by statute. The statutory provision is that "a will executed by an unmarried woman, shall be deemed revoked by her subsequent marriage." And the words "shall be deemed," mean "shall be[8]." But in what follows, the law of New York is violently misrepresented. For the author proceeds to say that "In other states *where the statutes are silent as to the effect of marriage as a revocation of a woman's will,*

[1] 5 How. Pr. 281. [2] 2 R. S., 64, § 41. [3] 142 Mass. 242.
[4] 138 Mass. 45. [5] 141 Mass. 75. [6] 138 Mass. 45. [7] 3 Mass. 17.
[8] Lathrop *v.* Dunlop, 4 Hun, 213, affirmed in 63 N. Y. 610.

an interesting question is presented by the passage of statutes authorizing married women to make wills. This evidently does away with the reason underlying the common law rule, and the question is often presented whether it destroys the rule together with the reason. A majority of the courts hold that such a statute prevents the marriage of a woman from acting *ipso facto* as a revocation of a prior will. * * * A minority of the courts adhere to the common law rule, and treat the marriage of a woman as a revocation of a prior will, *where no statute specifically provides for such a case.*" To this last sentence, the case of Brown *v.* Clark[1], is cited. But that case deals with a very different question. The question there presented was whether the express and explicit New York statute, to the effect that the will of an unmarried woman shall be revoked by her subsequent marriage, was abrogated by a subsequent statute conferring general testamentary power upon married women, and the court held that it was not so abrogated, but remained in full force, and operated to effect a revocation of the will of the testatrix upon her marriage, upon the ground that "the courts cannot dispense with a *statutory rule* because it may appear that the policy upon which it was established has ceased." The question of the effect the later statute might have had if the rule of revocation had rested upon the common law instead of upon an express statute was not considered or even referred to.

In dealing with the situation presented where a child is born to a testator after the execution of a will, the author first discusses (§ 283) the case where the testator, after making his will, marries and has issue; and then proceeds (§§ 287, 288, p. 328 *et seq.*), to discuss the effect of the mere birth of issue, after execution of the will, without reference to whether the marriage took place before or after such execution. He divides this latter subject into two parts: "§ 287. Effect of birth of child upon will of childless parent;" and "§ 288. Effect of birth of child upon will of parent who has other children living." Under the first of these two sections, he states that the statutes of various States may "in their essential features" be reduced to three classes, and that "Statutes of the first class provide that the birth of a child to testator shall *revoke the will* if such child is not provided for by will, or is not intentionally excluded. Statutes of this class *usually* by their terms apply only when testator had no children at the time of executing his will." To the remarks just quoted, he cites Smith *v.* Robertson.[2] Now the New York statute, as stated in the case thus cited, does not in such a case revoke the will, but as the court there say, "*instead of declaring the entire will revoked* by the subsequent birth of issue * * * renders it inoperative as to that portion of the testator's estate which, if he had died intestate, would have descended, or been distributed to the after-born child." And not only is this New York case mis-cited in support of propositions quite the opposite of what it holds, but when we come, in § 288, page 330, to the author's discussion of cases under his

[1] 77 N. Y. 369. [2] 89 N. Y. 555; 24 Hun 210.

"second class," which "do not provide for a revocation of the will by the subsequent birth of a child, but only that the after-born child shall take as if his parent had died intestate," no New York case is cited, though such is the law in that State,—thus fortifying the erroneous suggestion that New York belongs under the author's "first class."

The "Rule in Shelley's Case," is discussed in two sections, § 564 being devoted to the "Common Law," and § 565 to "Modern Statutes." In the former, we are told, page 657, that "when, by the exercise of these rules of construction, it is determined that testator's intention was to create a life estate in A, with the remainder to the heirs of A, the Rule in Shelley's case then applies, whether testator intended that it should or not, as a rule of property, and fixes A's estate as a fee." To this remark is cited, among other cases, that of *In re* Allen (Matter of Allen).[1] In that case, the devise was to testator's "sisters and their heirs and assigns." But the Rule in Shelley's Case never had any bearing on such a form of devise; to bring that Rule into operation it was necessary that the form should be to A *for life*, remainder to his heirs, or to the heirs of his body. The form "to A and his heirs," needed no "Rule." It was the recognized method at common law of conferring a fee.[2] As the author himself states, page 651, in another connection, "a grant to A and his heirs was the most appropriate and unmistakable method of devising a fee simple to A." Therefore the will in Matter of Allen had, and could have had, nothing to do with the Rule in Shelley's Case, even if that Rule had been in force when it was executed. But in fact, it had been abolished in New York (1 R. S. 725, § 28) more than thirty years before the will in question was executed. And having thus suggested, by implication, that the Rule is still in force in New York, the author, in proceeding, in the next section, to a discussion of Modern Statutes affecting the Rule, in which he says that in some States it has been abolished by statute, does not, among his numerous references, cite the New York statute or any New York case.

In discussing the *cy pres* doctrine, (§ 655, page 763), the author cites, to the proposition that in certain States the doctrine has been to some extent recognized and adopted by statute, one New York case,—Allen *v.* Stevens[3]. The judgment in that case, (after an intermediate reversal by the Appellate Division[4]) was finally affirmed, in 1899 in 161 N. Y. 122. It would, perhaps, have been quite as well, to refer to the elaborate opinion of the Court of Appeals, instead of to that at Special Term.

Under the subject of dower, we find, among other sections, two (§§ 712 & 713, pp. 851–854), entitled respectively "Common law rule that devise was presumed to be in addition to dower," and "Statutory rule that devise is presumed to be in lieu of dower." As the common law rule is in force in New York, it was an agreeable surprise to find the citation, under the former section, of

[1] 151 N. Y. 243. [2] See Thurber *v.* Chambers, 66 N. Y. 42, 46–7.
[3] 22 Misc. 158. [4] 33 App. Div. 485.

"Frankes *v.* Weigand, 66 N. Y. 918." But unfortunately, that case is not to be found in 66 N. Y., and a further search revealed the fact that it was nowhere to be found in any volume of New York reports, official or unofficial. It is, in fact, to be found, as Franke *v.* Wiegand, in 97 Iowa, 704. The author also cites this case in two other instances, in each of which the name of either the plaintiff or the defendant is again mis-spelled. But although this alleged New York citation was not very satisfying, the author hastens to make amends by citing to the next section, above mentioned, a real New York case in support of a doctrine with which it has no relation at all. For that section, as stated, relates to the "statutory rule" that a devise to testator's wife, in the absence of a contrary intention appearing in the will, is "presumed to be in lieu of dower." Now there is no such rule, whether statutory or otherwise, in New York, and accordingly, of course, no such doctrine, or anything like it, has been laid down by the courts. The statement in the text is that "*under such a statute* a devise to testator's widow *is presumed to be in lieu of dower* in any real estate which she might claim, including real estate sold [by] testator previous to his death, by deed in which the wife did not join." And here follows the citation above referred to of Nelson *v.* Brown.[1] In that case it was decided that the devise to the widow was given in lieu of dower, but this decision was based on the quite sufficient reason that the will so provided, in express terms. This has nothing to do with any rule (non-existent in New York) that a devise to testator's widow is presumed to be in lieu of dower.

There is evidence that the author has spent a great deal of time and thought on this work. But what has been said is sufficient to show that any one who reads it must keep his eyes unusually wide open, and that, although one object of the author, as stated in the preface, has been to set forth the law of wills in a form "easy of comprehension for the student," the law student would do well to confine his attention to other sources of information. The work needs, in respect to accuracy of statement and citation, to be overhauled. It has some excellent features, and if it were rendered accurate throughout, it would be a useful book.

A History of Political Theories, Ancient and Mediæval. By William Archibald Dunning. New York: The Macmillan Co. 1902. pp. xxv. 360.

Professor Dunning believes that political theories result from and are determined by, more than they lead to, the corresponding political institutions; and he is careful to show the relations between the theories which form the primary subject of his treatise and the laws and customs from which those theories have sprung. This principle affords him a criterion of selection which has made it unnecessary to write a comprehensive history of the entire literature of politics; he regards it as sufficient for his purpose to treat of those authors whose work bears some definite relation to the

[1] 144 N. Y. 384.